

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 90

Docket Nos. DC-3330-09-0241-I-1
DC-3330-09-0189-I-1

Christopher J. Roesel,

Appellant,

v.

Peace Corps,

Agency.

May 29, 2009

Christopher J. Roesel, Covington, Georgia, pro se.

Marianne Perciaccante, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeals under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. We JOIN these appeals under [5 C.F.R. § 1201.36](#)(b). Further, we DENY the petition for review because it does not meet the criteria for review under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeals on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING in part the appellant's request

for corrective action under VEOA, and DISMISSING the remainder of one of the appellant's appeals for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a VEOA appeal in which he contended that the agency's failure to select him for vacancy announcement number OPC7-A0221-RT violated his veterans' preference rights. Initial Appeal File, MSPB Docket No. DC-3330-09-0189-I-1 (IAF 189), Tab 1. The administrative judge issued an acknowledgment order in which she informed the appellant that he has the burden of proving the Board's jurisdiction over his appeal, and provided him with specific information as to how he could meet his burden. IAF 189, Tab 2. The acknowledgment order further informed the appellant that he must show that he had exhausted his remedies with the Department of Labor (DOL). *Id.*

¶3 While that appeal was pending, the appellant filed a second VEOA appeal in which he contended that the agency violated his veterans' preference rights by failing to select him for fifteen additional positions. Initial Appeal File, MSPB Docket No. DC-3330-09-0241-I-1 (IAF 241), Tab 1. The administrative judge issued an acknowledgment order in that appeal in which she again informed the appellant that he has the burden of proving the Board's jurisdiction over his appeal, and provided him with specific information as to how he could meet his burden. IAF 241, Tab 2. The acknowledgment order also informed the appellant that he must show that he had exhausted his remedies with DOL. *Id.*

¶4 During a telephonic status conference, the appellant informed the administrative judge that he had not intended to file a second appeal but, instead, intended to supplement his existing appeal. IAF 241, Tab 6 at 2. The administrative judge thus "combined" the appeals for adjudication. The administrative judge then issued a show-cause order in which she provided the appellant with further information as to how he could meet his burden of proving that he exhausted his remedies before DOL and his burden of establishing the

Board's jurisdiction over his appeals. *Id.* at 2-3. After considering the parties' responses to the show-cause order, the administrative judge issued an initial decision dismissing the appeals for lack of jurisdiction on the written record because the appellant did not request a hearing. Initial Decision (I.D.) at 2, 12; *see* IAF 189, Tab 1 at 3; IAF 241, Tab 1 at 3.

¶5 The appellant timely petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶6 As a preliminary matter, although the administrative judge treated these appeals as joined, she did not actually join the appeals for adjudication. IAF 241, Tab 6 at 1-2. Joinder of two or more appeals filed by the same appellant may be appropriate when joinder would expedite processing of the appeals and when joinder would not adversely affect the interests of the parties. *Boechler v. Department of the Interior*, [109 M.S.P.R. 542](#), ¶ 14 (2008); [5 C.F.R. § 1201.36](#)(a)(2), (b). We find that these appeals meet the regulatory criteria for joinder, and we join them here. *See, e.g., Seth-Morris v. Office of Personnel Management*, [94 M.S.P.R. 166](#), 166 n.1 (2003).

¶7 Under [5 U.S.C. § 3330a](#)(a)(1)(A), “[a] preference eligible who alleges that an agency has violated such individual’s rights under any statute or regulation relating to veterans’ preference may file a complaint with the Secretary of Labor.” Such a complaint “must be filed within 60 days after the date of the alleged violation.” [5 U.S.C. § 3330a](#)(a)(2)(A). If the Secretary of Labor is unable to resolve such a complaint within sixty days after the date on which it is filed, the complainant may appeal the alleged violation to the Board. [5 U.S.C. § 3330a](#)(d)(1). In order to establish jurisdiction over a VEOA appeal, an appellant must: (1) show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of

VEOA; (ii) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Hayes v. Department of the Army*, 2009 MSPB 40, ¶ 9; *Heckman v. Department of the Interior*, [109 M.S.P.R. 133](#), ¶ 6 (2008), *overruled in part on other grounds by Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#), ¶¶ 8-13 (2009). For the appellant to meet VEOA's requirement that he exhaust his remedy with DOL, he must establish that: (1) he filed a complaint with the Secretary of Labor; and (2) the Secretary of Labor was unable to resolve the complaint within sixty days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. *Hayes*, 2009 MSPB 40, ¶ 9; *Heckman*, [109 M.S.P.R. 133](#), ¶ 6.

¶8 The sixty-day filing deadline set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#), however, is subject to equitable tolling, and an employee's failure to file a complaint within that sixty-day period does not summarily foreclose the Board from exercising jurisdiction to review the appeal. *Kirkendall v. Department of the Army*, [479 F.3d 830](#), 835-44 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007); *Hayes*, 2009 MSPB 40, ¶ 10. The Supreme Court explained in *Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 96 (1990), that federal courts have typically extended equitable relief only sparingly, and that the Court had allowed equitable tolling in situations where the complainant had actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant had been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *See Hayes*, 2009 MSPB 40, ¶ 10.

¶9 In *Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#) (2009), the Board clarified the law surrounding the question of jurisdiction when a preference eligible has failed to timely file a DOL complaint and equitable tolling does not apply. Citing *Kirkendall*, 479 F.3d at 835 n.2, the Board determined that a failure to meet the sixty-day time limit for filing a DOL complaint under [5](#)

[U.S.C. § 3330a\(a\)\(2\)\(A\)](#) is not a failure to exhaust administrative remedies that deprives the Board of jurisdiction over a VEOA claim. *Garcia*, [110 M.S.P.R. 371](#), ¶¶ 8-13; *see Hayes*, 2009 MSPB 40, ¶ 12. Instead, the Board held that, when an appellant files an untimely complaint with DOL and equitable tolling does not apply, the request for corrective action must be denied based on a failure to meet the time limit for filing a complaint with DOL set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). *Garcia*, [110 M.S.P.R. 371](#), ¶ 13; *see Hayes*, 2009 MSPB 40, ¶ 12.

¶10 With respect to the appellant's claim in MSPB Docket No. DC-3330-09-0189-I-1, the administrative judge found that the appellant failed to exhaust his remedies before DOL because DOL determined that his complaint was untimely filed. I.D. at 5. The appellant neither conceded nor disputed that his DOL complaint was rejected as untimely; instead, he contended that his appeal should be subject to equitable tolling because he had reached a settlement with the agency in a complaint before the Equal Employment Opportunity Commission (EEOC) concerning the pertinent vacancy announcement, the agency allegedly breached the settlement agreement, but he delayed in filing a complaint with DOL because he "had been told [the agency] had impunity from following the law." IAF 189, Tab 3 at 5; *see id.*, Tab 7 at 5. The AJ found, and we agree, that the appellant failed to establish a compelling justification for the filing delay warranting the application of equitable tolling. I.D. at 7-9.

¶11 On review, the appellant contends that his appeal to the Board was timely filed, but he does not contest the administrative judge's finding that his complaint to DOL was rejected as untimely filed. PFR File, Tab 1 at 4-7. This allegation does not warrant granting the appellant's petition for review. However, the Board has held that, where DOL rejects a VEOA complaint as untimely filed and the appellant fails to establish circumstances warranting the application of equitable tolling, the proper disposition of the appeal is not to dismiss it for lack of jurisdiction, as the administrative judge did here, but to deny the appellant's

request for corrective action for failure to meet the time limit for filing a complaint with DOL set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). *Hayes*, 2009 MSPB 40, ¶¶ 12-13; *Garcia*, [110 M.S.P.R. 371](#), ¶ 13. Thus, the AJ erred by dismissing the appeal for lack of jurisdiction and we reopen the appeal to deny VEOA corrective action.

¶12 In MSPB Docket No. DC-3330-09-0241-I-1, the appellant asserted that the agency violated his veterans' preference rights by failing to select him for fifteen additional positions. The agency contended that the appellant's claims concerning seven of these positions had previously been litigated before the Board and had also been the subject of the settlement agreement in the appellant's case before the EEOC. IAF 241, Tab 8 at 8-10. The administrative judge determined that the appellant's claims regarding vacancy announcement numbers DPC6-A0165A, OPC6-A0191, OPC6-A0159, DPC6-A0166, DPC6-A0210, and DPC6-A0214 were the subject of a final decision on the merits in a prior Board VEOA appeal and were barred by the doctrine of res judicata, and she dismissed that portion of the appeal for lack of jurisdiction.¹ I.D. at 9-10.

¶13 Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Tanner v. U.S. Postal Service*, [94 M.S.P.R. 417](#), ¶ 8 (2003); *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). Res judicata precludes the parties from relitigating issues that were, or could have been, raised in the prior action. *Tanner*, [94 M.S.P.R. 417](#), ¶ 8; *Peartree*, 66 M.S.P.R. at 337. Res judicata is a basis to dismiss an appeal over which the

¹ These six vacancy announcement numbers are taken from the agency's evidence and argument at IAF 241, Tab 8 at 8-9 & n.2, 28-32, 35, 40-44. It appears that the administrative judge's recitation of the vacancy announcement numbers in the initial decision contained some typographical errors, but these minor mistakes did not prejudice the parties' substantive rights and provide no basis for reversal of an initial decision. See *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

Board has jurisdiction, not a basis to dismiss an appeal for lack of jurisdiction. *Tanner*, [94 M.S.P.R. 417](#), ¶ 9.

¶14 As the administrative judge correctly found, the agency introduced uncontested evidence showing that the positions identified by the six vacancy announcement numbers noted above were actually litigated in *Roesel v. Peace Corps*, MSPB Docket No. AT-3443-07-0433-I-1 (Initial Decision, June 18, 2007).² IAF 241, Tab 8 at 8-9, 23-25, 33-35, 39-44. In that VEOA appeal, the administrative judge found that the Board had jurisdiction over the appeal, but she denied the appellant's request for corrective action under VEOA on the merits. IAF 241, Tab 8 at 23-25. Although that initial decision did not identify the positions in question by vacancy announcement number, the administrative judge here correctly found that the agency introduced undisputed evidence showing that the six vacancy announcement numbers were the six positions at issue in the prior appeal. I.D. at 9-10; IAF 241, Tab 8 at 33-35, 39-44. Therefore, the doctrine of res judicata precludes the appellant from attempting to relitigate those positions in this appeal. *Tanner*, [94 M.S.P.R. 417](#), ¶ 8; *Peartree*, 66 M.S.P.R. at 337; *see* I.D. at 9-10.

¶15 The appellant does not dispute on review that he raised these six positions in his prior appeal or that res judicata applies. Instead, he argues the merits of his underlying claim. PFR File, Tab 1 at 4-7. Therefore, his petition for review provides no basis for further review. However, the administrative judge erred by dismissing this portion of the appeal for lack of jurisdiction because res judicata is not a basis to dismiss an appeal for lack of jurisdiction. *See Tanner*,

² The initial decision became final on July 27, 2007, when neither party filed a petition for review.

[94 M.S.P.R. 417](#), ¶ 9. We therefore reopen the appeal and deny corrective action as to these six vacancy announcement on the merits of the appellant's claims.³

¶16 Finally, the appellant claimed that the agency violated his veterans' preference rights when it failed to select him for any of nine additional positions advertised under vacancy announcement numbers OPC6-A0057, DPC7-A0266, DPC7-A0222, DPC7-A0174, DPC7-A0180, OPC7-A0162, OPC7-A0153, OPC7-A0094, and CD-06-02. The administrative judge found that the appellant failed to submit any evidence showing that he exhausted his remedies with DOL with respect to these positions. I.D. at 10-11. We agree. Although the appellant contends on review that the record shows that he satisfied the exhaustion requirement, PFR File, Tab 1 at 4, all the evidence of exhaustion in the record either pertains to some position other than these nine positions, or it pertains to vacancy announcements at another agency, *see* IAF 241, Tab 8 at 13-14, 18-22. Therefore, the administrative judge correctly found that the appellant failed to submit evidence showing that he exhausted his remedies before DOL with respect to these nine positions. Because the appellant failed to meet the exhaustion requirement with respect to these nine positions, he failed to establish Board jurisdiction over this portion of his VEOA appeal, and the administrative judge correctly dismissed this portion of his appeal for lack of jurisdiction.⁴ *See Coster v. Department of Agriculture*, [103 M.S.P.R. 191](#), ¶ 6 (2006).

³ In light of this ruling, we need not determine whether the appellant is precluded by the EEOC settlement agreement from raising claims concerning these six positions before the Board.

⁴ In light of our disposition in these appeals, we need not decide whether the appellant's appeals were timely filed.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.